Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	

REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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Qwest Communications International Inc. ("Qwest") hereby submits its reply comments on the Intercarrier Compensation proposal submitted on July 24, 2006 as part of a joint effort by a variety of industry participants (hereinafter "Missoula Plan" or "Plan").[1]

I. INTRODUCTION AND SUMMARY

For nearly six years, the Federal Communications Commission ("Commission") has been seeking, in this proceeding, to reform a highly dysfunctional system of intercarrier compensation. While Qwest had hoped that the initial round of filings regarding the Missoula Plan would bring the Commission closer to resolving this critical issue, it is now clear that this has not occurred. As Qwest detailed in its initial comments, some of the ideas and concepts elucidated in the Missoula Plan (ideas that unfortunately are not actually realized in the details of the Plan itself) form a starting point from which it is conceivable that a viable restructuring of intercarrier compensation might be accomplished. However, Qwest was also careful to note that the flaws in the Missoula Plan are very significant.

The most prominent flaws in the Plan are its failure to move towards a bill-and-keep solution, its related failure to eliminate the widespread arbitrage opportunities in existence under

[1] NARUC Notice of Written *Ex Parte* Presentation (47 C.F.R. § 1.1204(a)(10)) ("NARUC *Ex Parte*"); *see also* Comment Sought on Missoula Intercarrier Compensation Reform Plan, CC Docket No. 01-92, Public Notice, 21 FCC Rcd 8524 (2006), Order, 21 FCC Rcd 9772 (2006).

the current regime and the related complexity of the various track-based compensation plans and phases. Indeed, as Qwest detailed in its comments, the Missoula Plan fails to even implement a truly unitary rate and not only fails to eliminate existing arbitrage problems, but creates new arbitrage opportunities. Additionally, the proposed restructure mechanism improperly increases the size of the Federal Universal Service Fund ("USF") and fails to adequately effect federal and state coordination as any plan must. The Missoula Plan also proposes a rule using numbers as a surrogate for location that is contrary to law, attempts to legitimize practices that misrepresent the nature of certain traffic, and only increases the potential for arbitrage problems. The Missoula Plan also proposes a faulty resolution for wireless traffic and the intra-major trading area ("MTA") rule, a flawed transit service proposal, a flawed phantom traffic solution, a flawed 8YY implementation, and flawed information services access and Voice over Internet Protocol ("VoIP") provisions. The Missoula Plan also fails to give proper effect to the "ESP [enhanced service provider] exemption," and proposes flawed rules for "ISP [Internet service provider] reciprocal compensation." Finally, as Qwest also discussed at length in its initial comments, the Plan fails to properly account for critical underlying legal issues that any Intercarrier Compensation ("ICC") reform must properly address.

In the initial round of comments, numerous parties joined Qwest in criticizing these and other critical aspects of the Plan.[2]

The level of criticism reflected in the initial round of comments leads to only one possible conclusion: if there is to be any meaningful reform in this proceeding in the near-term timeframe, the only viable approach at this time is for the Commission to act to address, on an

[2] *See, e.g., generally,* Broadview Networks, *et al.*, General Communication, Inc., Illinois Independent Telephone Association, Integra Telecom, Inc., National Cable & Telecommunications Association, Sprint Nextel Corporation, T-Mobile,USA, Inc., Verizon telephone companies and Verizon Wireless.

interim basis, a handful of key issues underlying the ICC debate. Qwest and other carriers have strongly encouraged the Commission to avoid implementing a new comprehensive reform plan on a piecemeal basis. However, Qwest has also encouraged the Commission to take interim steps to fix a limited number of fundamental issues that cause much of the dysfunction in the current regime. The Commission has already indicated a willingness to consider immediate phantom traffic reform. As stated in its comments on the Missoula Plan provisions regarding phantom traffic reform, Qwest continues to support immediate action by the Commission in the area of phantom traffic, but asks that the Commission take action consistent with Qwest's *ex partes* and comments on this subject[3] rather than enacting the flawed Missoula Plan provisions on phantom traffic. Qwest also believes the Commission can take important steps in this area by entering other interim rulings clarifying current law on wireless traffic and the intra-MTA rule and on transiting. Similarly, the Commission should also issue an interim order clarifying the intercarrier compensation issues arising from the mischaracterization of local traffic and the "Virtual NXX" ("VNXX") issue and clarifying the proper interpretation of the ESP exemption. While falling short of the comprehensive reform that is needed, such an approach could result in meaningful reform and greatly reduce the amount of arbitrage while debate continues about a permanent, comprehensive ICC reform plan.

With respect to permanent, comprehensive reform, Qwest continues to advocate for a bill-and-keep at the edge approach to intercarrier compensation, rather than a system where carriers pay regulated rates to each other for transport and termination. Qwest firmly believes that this is the only approach that incorporates all the necessary components of a successful plan. These components are that, again: any intercarrier compensation regulatory structure must be

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[3] *See, e.g.*, Qwest *ex partes*, CC Docket No. 01-92, filed Feb. 3rd and 6th, 2006.

comprehensive and include intrastate traffic as well as interstate; reform must permit carriers a realistic opportunity to recover through other sources any revenues that are lost through mandatory access and reciprocal compensation rate reductions and mandated expense increases (*e.g.*, increased rates for ISP-bound and incumbent local exchange carrier ("ILEC") extended area service ("EAS") traffic proposed in the Missoula Plan); reform must be "holistic" -- *i.e.*, any new plan cannot be implemented on a piecemeal basis; the plan must be competitively neutral; the plan must not create new arbitrage opportunities; the plan must be timely; the plan must be lawful; the plan must be easy to implement, with minimal need for capital investment or major changes to recording/billing systems; the plan must be simple to administer and enforce; and the plan must ultimately be deregulatory. Qwest's bill-and-keep proposal, based on universally defined "edges" of carrier networks with each carrier having the obligation to transfer its own traffic to the appropriate edge of a terminating carrier's network, is just such a plan. Qwest continues to believe that bill-and-keep is the optimal solution to intercarrier compensation.

II. THE COMMISSION SHOULD ENTER INTERIM RULINGS ADDRESSING SEVERAL FUNDAMENTAL ISSUES UNDER THE CURRENT REGIME

A. The Commission Should Enter Interim Relief With Respect To Wireless Traffic And The Intra-MTA Rule.

In its initial comments in connection with the Missoula Plan, Qwest detailed how the provisions of the Missoula Plan dealing with compensation in connection with the exchange of wireless traffic among carriers and, by extension, the Missoula Plan's proposed handling of the intra-MTA rule are problematic. Qwest encourages the Commission to enter immediate relief

addressing the existing problems associated with Commercial Mobile Radio Service ("CMRS") traffic -- *i.e.,* without waiting for broader reform.[4]

1. The current regulatory treatment of CMRS traffic creates rate disparity and arbitrage opportunities, primarily because of the disparities in local calling areas.

Vastly different billing practices and intercarrier compensation rules currently apply to ILEC and CMRS calls. Such differences are rooted in anomalies growing out of the initial *Local Competition* proceeding, rather than logic. Qwest detailed these anomalies in its prior filings and will not attempt to restate those comments here.[5]

In short, different practices and rules apply to calls involving CMRS providers versus those with wireline providers, both in terms of end-user charges and intercarrier compensation payments. For the most part, this arises from the fact that CMRS providers generally have local calling areas covering an entire MTA as compared to the much smaller ILEC local calling areas. This problem is complicated by the fact that wireless and wireline traffic are also subject to different regulatory jurisdictions. The much larger CMRS local calling areas are established by federal law.[6] Wireline local calling areas are subject to state regulation.

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[4] As with each of the issues addressed in these reply comments, the problems associated with CMRS traffic disappear under Qwest's bill-and-keep at the edge plan. *See* Comments of Qwest Communications International Inc. on Further Notice of Proposed Rulemaking, CC Docket No. 01-92, filed May 23, 2005 at 52-54 ("Qwest FNPRM Comments"); *see also* Reply Comments of Qwest Communications International Inc. on Further Notice of Proposed Rulemaking, CC Docket No. 01-92, filed July 20, 2005 at 51 ("Qwest FNPRM Reply Comments").

[5] *See* Qwest FNPRM Comments at 50-52.

[6] *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Services Providers,* First Report and Order, 11 FCC Rcd 15499, 16014 ¶ 1036 (1996) ("*Local Competition Order*") (subsequent history omitted).

2. The Commission should, in an interim order, eliminate the intra-MTA rule.

The Commission should eliminate the "intra-MTA rule." Again, that rule provides that the local service area for calls originating on or terminating on CMRS networks is the MTA. The Commission, in the *Local Competition Order*, established this rule based on the following rationale:

> Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (*i.e.*, MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5) as it avoids creating artificial distinctions between CMRS providers.[7]

However, while this definition may avoid creating distinctions between CMRS providers, it creates the rate disparity and arbitrage problems described above and in Qwest's prior filings. The Commission could eliminate most of these CMRS-specific compensation problems by simply eliminating the intra-MTA rule. The Commission should rule that the local service area for CMRS-LEC traffic is the same area as it is for LEC-LEC traffic -- the ILEC local calling area.

3. The Commission should, also, in an interim order, reaffirm that transit service providers are not responsible for compensating the terminating carrier when the originating carrier is a CMRS carrier.

Under the intra-MTA rule, the originating CMRS carrier pays reciprocal compensation to the terminating carrier. However, when originating carriers use a transiting carrier to deliver intra-MTA traffic, terminating carriers have often sought to recover access charges from the transiting carrier by erroneously arguing that the transiting carrier is an IXC and that the traffic is no longer local traffic. This problem often occurs where CMRS carriers are the originating carrier. Virtually every federal court to address such an argument by a terminating carrier has

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[7] *See id.*

rejected it.[8] Again, as discussed immediately above, Qwest believes the Commission should eliminate the intra-MTA rule. However, if the Commission decides to retain the intra-MTA rule, it should reaffirm that the terminating carrier is to be compensated by the originating carrier, not by the transiting carrier.

B. The Commission Should Also Enter Interim Relief On Transiting.

Qwest, in its initial comments, detailed the flaws in the Missoula Plan transiting proposal. Among other things, as detailed in those comments, the Missoula Plan would dramatically change the rules governing transit service (*i.e.*, the carriage of non-access traffic where the transiting carrier has no end-user relationship) and its corollary in the access world -- jointly-provided switched access ("JPSA"), with both conditionally becoming transit service under the Plan. Additionally, the Missoula Plan would impose new mandatory obligations for certain carriers to provide transit service and would establish non-market rates for transit service.[9]

On the other hand, Qwest supported certain aspects of the Missoula Plan's transiting proposal. For example, the Missoula Plan proposal would also codify current law providing that in no event is a transit service provider liable for the intercarrier compensation owed to the terminating provider for traffic that the transit service provider delivers.[10]

Recognizing that there simply is no emerging consensus for new transiting rules or a comprehensive plan that would include new transiting rules, Qwest encourages the Commission

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[8] *See, e.g., 3 Rivers Telephone Cooperative v. US West*, 2003 U.S. Dist. LEXIS 24871 (D. Montana 2003).

[9] Missoula Plan at 49.

[10] *Id.* at 51. Qwest understands this aspect of the Plan to define terminating provider to be the called party's carrier. In other words, the proposal codifies current law providing that in no event is a transit service provider liable for the non-access or access charges applicable when it hands traffic for termination to the terminating provider. This proposal does not address other transit compensation issues.

to, instead, focus on issuing an order entering interim rulings regarding transiting that would eliminate numerous industry problems under the current ICC regime. Specifically, the Commission should clarify that the following is the correct treatment of transiting traffic under the intercarrier compensation regime.[11]

1. Transiting is an interconnection matter subject to Sections 201 and 202 of the Act.

As the Commission notes in the *Further Notice* in this preceding,[12] certain CLECs and CMRS carriers have argued, historically, that Sections 251(a)(1)(requiring telecommunications carriers to "'interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers'") and 251(c)(2)(B)(requiring ILECs to provide interconnection "'at any technically feasible point within the carrier's network'") of the Act create a carrier obligation to provide transiting. The Commission should enter an interim order rejecting these contentions and clarifying that transiting is an interconnection service subject to Sections 201 and 202 of the Act, and is not subject to the rules related to common carrier services offered to the public and interconnection under these circumstances can only be ordered after notice and a hearing as

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[11] As Qwest detailed in its comments and reply comments in connection with the *Further Notice*, Qwest's proposed plan for transiting in connection with its bill-and-keep at the edge plan is a market-oriented approach that is consistent with current law on transiting. Under Qwest's plan, in the transiting context, the intermediate carrier or transit service provider must be compensated by the originating carrier and an agreement for payment for transiting services -- with pricing determined by the market -- must be reached before the service is provided. This approach is, in fact, not only the most sound approach to transiting, but, as described more fully in the text, is the approach required by the Act and is most consistent with the important policy goals set forth in the *Further Notice*. This approach is also most consistent with the central premise underlying bill-and-keep at the edge -- that premise is that, when two carriers exchange traffic, each carrier bears total responsibility for the costs incurred in processing any given call on its side of the network edge and recovers those costs from its own end user involved in the call. *See* Qwest FNPRM Comments at 8-22 and Qwest FNPRM Reply Comments at 21-30 regarding how Qwest's bill-and-keep plan would deal with transiting.

[12] *See In the Matter of Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4740-41 ¶ 127, n.363 (2005).

required under Section 201(a) of the Act.[13] While there might be instances where a carrier could compel transiting interconnection under the Act, those circumstances will be very limited. Certainly the record does not support a general rule on transiting requiring that it be provided on a universal basis at regulated rates.

No other provision of the Act imposes an obligation upon carriers to provide transiting services between two other carriers. Section 251(a), on its face deals only with physical connections and imposes no such duty on carriers.[14] Similarly, Section 251(c)(2) plainly only speaks to the ILEC duty to provide interconnection with *the ILEC's* network. Neither of these provisions can reasonably be read to obligate an ILEC or any other carrier to provide transiting between the networks of two other carriers. Indeed, as the Commission acknowledges in the *Further Notice*, "[t]he Commission's rules define the term 'interconnection' to mean 'the linking of two networks for the mutual exchange of traffic' and not 'the transport and termination of traffic.'"[15] As the Commission also acknowledges in the *Further Notice*, interpreting Section 251(a) to require transiting might be read to suggest that, if two carriers choose to meet their obligations under Section 251(a) by interconnecting directly, each might arguably be required to pass traffic to other carriers through that direct connection -- an obviously absurd result.

At bottom, a carrier obligation to provide transiting can only be founded upon the requirements of Sections 201 and 202 of the Act that common carriers provide interconnection with other carriers under the circumstances described in Section 201. Contracts or tariffs for such interconnection must avoid "any unjust or unreasonable discrimination in charges . . ."[16] In

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[13] *See AT&T Corporation v. FCC*, 292 F.3d 808, 812-13 (D.C. Cir. 2002).

[14] *See AT&T v. FCC*, 317 F.3d 227, 234-35 (D.C. Cir. 2003).

[15] *Further Notice*, 20 FCC Rcd at 4741-42 ¶ 128 (citing 47 C.F.R. § 51.5).

[16] 47 U.S.C. §§ 201, 202.

other words, the Commission should allow the market to establish transiting rates and those rates should be deemed reasonable absent a showing to the contrary on a case-by-case basis. Intercarrier contracts subject to filing under Section 211(a) are the optimal means for establishing transiting relationships.[17]

2. The Act does not require or permit non-market based transiting compensation rates.

The Commission should also clarify in an interim order pending comprehensive reform that there is no basis for the argument that, if transiting is required, Total Element Long Run Incremental Cost ("TELRIC") or some other non-market-based pricing methodology should be used to establish regulated rates for transiting. To begin with, there is no basis whatsoever under the Act for an argument that TELRIC pricing should be applied to transiting services. Even if Section 201(a) or Section 251(a) could be read to impose an obligation on carriers to provide transiting services, the Act would not call for TELRIC pricing to be mandated for such services. Section 252(d)(1), out of which TELRIC arises, is expressly limited to Section 251(c)(2) interconnection and Section 251(c)(3) unbundled network elements and would not apply to a transit service obligation outside of those sections. Moreover, the law is clear that TELRIC is non-confiscatory in only very limited circumstances.[18]

No matter how this docket is ultimately resolved, the Commission should not apply reciprocal compensation to transiting services (*i.e.*, permit a terminating carrier to bill a transiting carrier). The plain language of Section 252(d)(2)(A) (requiring that reciprocal compensation pursuant to Section 251(b)(5) be priced based on "the costs associated with the transport and

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[17] *See* Qwest *ex parte*, CC Docket No. 01-92, filed Mar. 23, 2006 ("Qwest March 23, 2006 *ex parte*").

[18] *See Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 528 n.39 (2002), *see also Local Competition Order*, 11 FCC Rcd at 15872 ¶ 739.

termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier") makes clear that reciprocal compensation does not apply to transiting costs.[19] In the transiting context, where the transit provider is an intermediate carrier lacking a relationship with an end user involved in the traffic at issue, there simply is no issue of reciprocal compensation.

Finally, certain carriers argue that, if reciprocal compensation does not apply to transiting traffic, access charges must apply.[20] Even if access charges remain in any new compensation structure, there is no basis for such an argument in the language of the Act and such a novel approach to transiting would be difficult to square with either Sections 251(b)(5) or 252(d)(2). Moreover, to require transit service providers to pay access charges would be an absurdly unfair result. IXCs pay access charges to LECs when they use LEC networks to either originate or terminate calls placed by the IXC's end-user customer. IXCs then recover the costs for those access charges in the rates they charge to their end-user customers. Transit service providers accomplish the transport of traffic between carriers. They are not providing a service to an end user and, in fact, have no end-user customer involved in the traffic they transit from whom they can recover the costs of access charges that they may be charged. They are entitled to fair, market-determined compensation from the originating carrier for the transiting service that they provide.

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[19] As is discussed below, the Commission has actually decided this issue.

[20] *See Further Notice*, 20 FCC Rcd at 4743 ¶ 132.

3. Immediate clarification of transiting obligations in a manner consistent with Commission Rules and the policy goals of the *Further Notice* is vital.

The Commission should immediately clarify that the approach detailed above is the approach required by both the relevant prior rulings of the Commission and the important policy goals set forth in the *Further Notice*.

The Commission's prior rulings support Qwest's proposal. Qwest detailed the effect of those prior rulings in its prior comments and will not restate that analysis here. Suffice to say, the Commission's *Texcom* decisions and the Commission's Wireline Competition Bureau's (the "Bureau") *FCC Virginia Arbitration Order*, made clear that the originating carrier is responsible for transiting costs *and* that carriers should be free to negotiate market-based arrangements for transiting.[21] In the *FCC Virginia Arbitration Order*, the Bureau acknowledged, with respect to whether or not carriers had an obligation to provide transiting, that there is no "clear Commission precedent or rules declaring such a duty."[22] Finally, the Bureau also concluded in that case that

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[21] *See Texcom, Inc. v. Bell Atlantic Corp.*, File No. EB-00-MD-14, Memorandum Opinion and Order, 16 FCC Rcd 21493, 21495 ¶ 6 (citations omitted); *Texcom, Inc. v. Bell Atlantic Corp.*, Order on Reconsideration, 17 FCC Rcd 6275 6277 n.12 (citation omitted); *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, Memorandum Opinion and Order, 17 FCC Rcd 27039, 27100 ¶ 115, 27101 ¶ 117, 27305 ¶ 544 (2002) ("*FCC Virginia Arbitration Order*"). *See also* Qwest FNPRM Comments at 41-42.

[22] *FCC Virginia Arbitration Order* at 27101 ¶ 117; *See also In the Matter of Petition of Cavalier Telephone LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Arbitration*, Memorandum Opinion and Order, 18 FCC Rcd 25887, 25908-09 ¶ 38 ("*Cavalier Order*") (Wireline Bureau found there was no Commission precedent or rule holding that Verizon has a duty to provide transiting under the Act and expressly declined to create such a ruling under its delegated authority); *In the Matter of Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota*, Memorandum Opinion and Order, 18 FCC Rcd 7325, 7376 n.305 (2003) ("*New Mexico, Oregon and South Dakota 271 Order*") ("Although we do not address the merits of AT&T's assertion that Commission rules

"any duty Verizon may have under section 251(a)(1) of the Act to provide transit service would not require that service to be priced at TELRIC" and the Bureau expressly approved Verizon's charging of non-TELRIC rates for transiting.[23]

Qwest's transiting proposal also best furthers the policy goals set forth in the *Further Notice*. In the *Further Notice*, the Commission recognizes "the importance of identifying and implementing appropriate interconnection incentives for the future."[24] The Commission expressly seeks comment "on the possibility that mandated transiting or regulated rates for such service might discourage the development of this market."[25] In fact, shifting responsibility for traffic from the originating carrier to a third party transit provider does create misguided incentives. Indeed, the Commission acknowledges that "if a transit service obligation is imposed, indirectly interconnected carriers may lack the incentive to establish direct connections even if traffic levels warrant it."[26] These concerns, of course, dovetail with the overall goals of intercarrier compensation reform expressed elsewhere in the *Further Notice*. The central goals of reform should be to promote economic efficiency and to promote facilities-based competition in the marketplace.[27] As described more fully above, Qwest's plan for transiting best serves

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require Qwest to provide transit service under section 251(c)(2), we note that the Commission has not had occasion to determine whether incumbent LECs have such a duty, and we find no clear Commission precedent or rules declaring such a duty.").

[23] *FCC Virginia Arbitration Order*, 17 FCC Rcd at 27100 ¶ 115, 27101 ¶ 117 (approving non-TELRIC rates and stating "we decline, on delegated authority, to determine for the first time that Verizon has a section 251(c)(2) duty to provide transit service at TELRIC rates… any duty Verizon may have under section 251(a)(1) of the Act to provide transit service would not require that service to be priced at TELRIC.") (footnote omitted).

[24] *Further Notice*, 20 FCC Rcd at 4742 ¶ 129.

[25] *Id.*

[26] *Id.* at 4742-43 ¶ 131 (citation omitted).

[27] *Id.* at 4701-02 ¶ 31.

those goals.[28] While transiting services generally are provided by large ILECs today, Qwest believes there is a niche market for other carriers to provide such transport particularly under Qwest's bill-and-keep at the edge proposal. Entities such as Syringa Networks, INS, Onvoy, Verizon and Sprint already provide transit services within Qwest's region. In addition, there are many more carriers that operate tandems which provide access services to IXCs that would develop into a transit relationship upon implementation of Qwest's bill-and-keep plan. Qwest has also, in some instances, already lost transiting customers to other tandem service providers.

4. The Commission should also clarify in an interim order that transiting is an interconnection function subject to the Commission's jurisdiction.

As detailed in Qwest's prior filings, any rule that the Commission established for transiting should apply both to interstate transiting and intrastate transiting.[29]

C. The Commission Should Also Enter Interim Relief On Phantom Traffic.

Qwest also addressed, in its comments on the Missoula Plan and in its comments in response to the Commission's *Notice* regarding the Missoula Plan's more recent phantom traffic

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[28] With respect to the Commission's request for comment as to whether or not the billing information, in the transiting context, is adequate to determine the appropriate intercarrier compensation due, *see id.* at 4743-44 ¶ 133, Qwest believes that the billing information currently available in the transiting context is adequate. Qwest specifically opposes any attempt to impose obligations on the transiting carrier to provide specific billing information in the transiting context. Again, the information currently available is adequate and, as the Bureau expressly found in the *FCC Virginia Arbitration Order*, 17 FCC Rcd at 27102 ¶ 119, Regional Bell Operating Companies ("RBOCs") are not required to serve as billing intermediaries between carriers who terminate traffic to another carrier by using RBOC transit services. The originating carrier should be responsible for providing billing records to both the transit provider and the terminating carrier. Qwest does offer transit records, when available, for a fee to the terminating carrier so they can bill the originating carrier for the call. Qwest's plan would moot this issue except in those instances where a termination charge is permitted. Also, under bill-and-keep there is no opportunity for the terminating carrier to bill the originating carrier for the transit traffic so there is no need for the transit provider to send a transit record to the terminating carrier.

[29] *See* Qwest FNPRM Comments at 43-44.

proposal, the flaws contained in those phantom traffic[30] proposals. Qwest encourages the Commission to reject the Missoula Plan regarding interim relief regarding phantom traffic and instead take action in an interim order consistent with Qwest's *ex partes* on this subject.[31]

In summary, Qwest's phantom traffic proposal starts with proposed signaling rules that are similar to the Missoula Plan's proposed signaling rules. However, the Qwest plan eliminates several flaws of the Missoula Plan. In particular, Qwest advocates that the Commission clarify that carriers should not be able to deploy new multifrequency equipment with the purpose of avoiding the more stringent signaling requirements that apply to SS7 traffic.

The Missoula Plan supporters and Qwest agree that any interim phantom traffic relief must clarify that intermediate carriers would have no obligations with respect to signaling information population except to pass on what the originating provider gives them in terms of the required signaling parameters.

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[30] Phantom traffic describes a number of situations in which the traffic is delivered to a terminating carrier in a manner that makes appropriate billing impossible. This includes, by way of example, terminating access traffic that has been erroneously designated as interstate when in fact it is jurisdictionally intrastate, traffic intentionally mischaracterized to increase access revenues (*e.g.*, intra-MTA calls mischaracterized by small LECs as switched access), or long distance traffic that has been erroneously designated as local traffic. The latter includes VNXX, where carriers misrepresent long distance traffic as being local in order to avoid the access charges applicable to such traffic. As discussed in Qwest's comments with respect to the broader Missoula Plan, one of the main flaws of the Plan's proposed numbering rules is its apparent attempt to legalize the efforts of carriers to perform this particular type of arbitrage. Qwest opposes this change in the law. Moreover, as Qwest and other parties have said in filings in this and other dockets, the Commission must focus urgently on all aspects of the phantom traffic problem, including but not limited to VNXX. Again, the Commission could address this problem through comprehensive reform in the *Intercarrier Compensation* and *IP-Enabled Services* dockets. Qwest urges the Commission to act as soon as possible in these broader proceedings as piecemeal relief is often less effective. In the meantime, however, the Commission should act where it can -- *i.e.*, through the relief described in Qwest's prior filings on phantom traffic in this docket, through the relief detailed in this filing and in dockets such as the one established for the SBC/VarTec petitions dealing with the application of access charges to IP transported calls, WC Docket No. 05-276.

[31] *See,* note 3, *supra.*

However, Qwest's plan differs from the Missoula Plan in important ways. Most importantly, Qwest advocates that the way to solve the problem of terminating carriers needing to identify the responsible billing party for traffic terminated to them by transit providers is not, as the Missoula Plan proposes, to require transit service providers to provide call records and to invest as necessary to develop the capability to do that. Instead, in Qwest's view, the solution to that problem is simply for the Commission to clarify that all carriers exchanging local traffic are responsible for their own traffic and therefore have the ability and the obligation to enter into agreements to cover such exchange of traffic. While Qwest therefore supports the general concept in the Plan that each carrier can obtain an agreement setting forth the terms of interconnection, etc., Qwest does not support the detailed agreement process as set forth in the Plan and does not support the request that the *T-Mobile Order*[32] be extended to all such agreements. Qwest asks, instead, that the Commission clarify that the Act already facilitates the accomplishment of such agreements, but also clarify that only some of those agreements fall under Section 252. Others fall under Sections 201 and 202 of the Act.[33] Finally, Qwest asks that the Commission clarify that transit providers have no mandatory obligation to provide call detail records and that, in the event such records are provided, transit providers must be compensated for any call records that they do provide and must be compensated fairly for that function using a market-based rate.

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[32] *See In the Matter of Developing a Unified Intercarrier Compensation Regime, T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855 (2005), *appeals pending sub nom. Ronan Telephone v. FCC*, Case No. 05-71995 and cons. cases (9th Cir. 2005), *appeal stayed* to Mar. 20, 2007.

[33] *See, generally*, Qwest March 23, 2006 *ex parte*.

D. The Commission Should Also Issue An Interim Order Clarifying The Intercarrier Compensation Issues Arising From The Mischaracterization Of Local Traffic And The "Virtual NXX" Issue and Clarifying the Proper Interpretation of the ESP Exemption.

As has been previously noted, one of the most glaring weaknesses in the current intercarrier compensation structure is that it is easily manipulated to create uneconomic arbitrage. This is especially evident in the case of VNXX and misinterpretations of the "ESP Exemption." The Commission could go a long way toward eliminating these problems by issuing an interim order clarifying the intercarrier compensation issues arising from the mischaracterization of local traffic and the VNXX issue and clarifying the proper interpretation of the ESP exemption.

1. The Commission should decisively clarify that a call between two end points is classified based on the locations of those end points.

One of the most common efforts to game the current access charge regime is called VNXX, whereby a CLEC classifies a long distance call as "local" because it has assigned a local number to the distant end point of the call. As Qwest detailed in its initial comments regarding the Missoula Plan, the proposal that classification and jurisdiction of a call be determined almost exclusively by a comparison of telephone numbers of the calling and called party is legally flawed, unworkable and encourages arbitrage and should be rejected.[34] But, the Commission should go further and immediately correct the VNXX arbitrage opportunity. The VNXX error, the misuse of numbers to pretend that a long distance call is local, is a major cause of uneconomical arbitrage schemes. Regardless of what the Commission does with respect to

[34] Missoula Plan at 25-26.

intercarrier compensation, it should clarify the correct regulatory treatment of VNXX traffic – most importantly, that VNXX traffic is interexchange traffic.[35]

2. The Commission should reiterate in an interim ruling that VNXX traffic is interexchange traffic, not local traffic.

a. VNXX is an interexchange service.

VNXX describes a situation where a call originating in one local calling area, using a dialed local number, is routed to another LEC which terminates to an end user physically located in another local calling area. In other words, it is an interexchange call that would be charged as a toll call had it not been mischaracterized by the dialing pattern as a local call. However, a number of CLECs claim that a call is local if the two numbers are local, regardless of where the calling and called party are located. This is simply not an accurate assessment of how calls are to be evaluated for the purpose of determining whether they are local or not.

The term "VNXX" is actually used to represent more than one situation. Because these different fact patterns can have divergent regulatory consequences, it is important to recognize and describe their differences. In the clearest case, a CLEC obtains a local number that it assigns to a customer in another state and LATA. The CLEC connects a call from the customer of the adjacent ILEC to its switch and from there to a long-haul line to the distant customer. In some cases, the CLEC does not even have a switch within the LATA of the adjacent ILEC, and simply patches the long distance call onto a private line from collocation space in the ILEC's central office. Because the number assigned to the remote customer is a local number, the CLEC claims that the call is a local call, subject to reciprocal compensation. Qwest submits that this

[35] Again, should the Commission adopt, as Qwest advocates, a bill-and-keep plan, the issue of VNXX effectively disappears as an intercarrier compensation issue -- at least, once bill-and-keep becomes fully effective. However, even if bill-and-keep is adopted, the Commission should clarify immediately that VNXX traffic is properly treated as interexchange traffic in order that it may be treated properly during any transition plan.

contention is a clear misstatement of the federal access charge rules as now written, and retains the right to bill these types of calls at the appropriate access rate without further action by the Commission.

A second VNXX situation involves a case where the called and calling parties are within the same LATA but are in different local calling areas. In this case the Commission's access charge rules do not govern, but the call is still not a local call. Thus, state rules concerning access and toll carriage apply – not Section 251(b)(5). Commission action is appropriate to clarify that this traffic too is not local in nature. A call is local or non-local based on the end-points of the call, not based on the assigned telephone numbers. This is becoming even more true every day as telephone numbers have less and less relevance in terms of geographic location with the advent of CMRS number portability and IP voice services. The bottom line is that a call is local or long distance based on the end points of the call, not the assigned telephone number. A simple statement by the Commission to this effect can eliminate a host of problems and arbitrage opportunities.

b. VNXX and Internet traffic (misinterpretation of the ESP exemption).

Some CLECs argue that the foregoing rules would not apply if the long distance traffic is ultimately bound for the Internet or some other information service Point of Presence ("POP"). The argument seems to be that all ISP-bound traffic is automatically local no matter where the ISP POP[36] is located. This is not correct and the Commission's rules make clear that ISP-bound traffic is interexchange traffic when an ISP POP is located in a distant local calling area from the other end point of the call. The proper application of the ESP exemption recognizes (indeed

[36] In this Section D, Qwest uses ISP to mean an Information Service Provider (a term interchangeable with Enhanced Service Provider) as opposed to an Internet Service Provider.

requires recognition) that VNXX traffic is interexchange traffic unless the ISP POP and the calling/called party are in the same local calling area. A number of CLECs appear to claim that the ESP exemption permits them to charge reciprocal compensation and avoid access charges for VNXX calls that are delivered to an ISP POP even when calls between identical end points would result in payment of access or toll charges (*e.g.*, when an ISP POP is in a remote local calling area, LATA or state).

This is predicated on a misunderstanding of the ESP exemption. The ESP exemption permits ISPs to purchase access at local rates (as an end user) when they use ILEC local exchange switching facilities to originate and/or terminate interstate traffic but only when the ESP is physically located within the local calling area of a party either calling to or called from the ESP.[37] The ESP exemption simply requires that LECs treat ISP POPs in the same manner as a PBX for access charge purposes. If a call to or from an ISP POP is a long distance call, the fact that one party to the call is an ISP POP is totally irrelevant to the proper classification of the call as long distance in nature.

Nor does the temporary compensation regime established by the *ISP Remand Order* change this conclusion that ISP-bound traffic, including ISP-bound traffic that is VNXX traffic, is interexchange traffic unless the ISP POP and the other end point of a call are in the same local calling area.[38] The findings of the *ISP Remand Order* and the decision of the United States Circuit Court of Appeals for the District of Columbia in reviewing that decision,[39] are consistent

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[37] We are dealing here, of course, with the Commission's rules on ESP access. We are not dealing with the extent to which carriers might negotiate other arrangements.

[38] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) (subsequent history omitted).

[39] *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

with this approach and assumed that the ISP reciprocal compensation issue was limited to a situation where both the calling party and the ISP POP were physically located in the same local calling area. By definition, where a call originates in one local calling area and terminates to an end user (including an ISP POP) physically located in another local calling area, the call is not a local call.

3. The Commission should also clarify that the ESP exemption is not a blanket classification of all traffic to and from an ISP POP as local for compensation purposes.

As is apparent from the foregoing, one of the root causes of arbitrage in the current environment is a misunderstanding of the so-called "ESP exemption." The ESP exemption, adopted in 1983 as part of the response to the "Leaky PBX" issue, enables an ISP POP to be treated in the same manner as a PBX that "leaks" long distance traffic into the local exchange. If the ISP POP is located locally, a call to or from the ISP POP is treated locally for compensation purposes, subject to the rules established in the *ISP Remand Order*. If the ISP POP is located in a local calling area that is different from the local calling area of the other end point of the call, the call is rated and classified in the same manner as if the ISP POP were a standard PBX -- *i.e.*, as a long distance call.

Qwest has previously detailed the fact that recognition of this regulatory reality has two significant consequences for the Missoula Plan that the Commission should recognize:

The Missoula Plan's recognition that ISP traffic should be classified based on the location of the ISP POP is accurate and commendable. However, the Missoula Plan's recommendation that this location be determined based on the telephone number assigned to the POP is flawed and should be rejected. This rejection should both be in the long term resolution to the intercarrier compensation issues and by way of an immediate clarification.

The Missoula Plan's further deviation from this principle in dealing with IP voice service[40] would create additional and unnecessary confusion. While the Commission still has not acted to classify IP voice service as either an information service or a telecommunications service, Qwest perceives that ultimately IP voice service will be so integrally intertwined with other IP enabled services that its information service classification will be inevitable. This does not mean, of course, that IP voice services will be free from all regulatory oversight (as the recent decisions regarding CALEA and E911 make clear). But it does mean that the Commission should recognize that IP voice service is an information service and, as is the case with other information services, that IP voice service should be classified based on the physical location of the ISP POP. The Missoula Plan's suggestion that this principle be ignored in the case of IP voice service is unworkable. The Commission should also clarify immediately that IP voice service is an information service and that it is subject to the same intercarrier compensation rules that apply when carriers originate or terminate traffic to or from an ISP POP.

At bottom, this is another area that would benefit greatly from an interim order of clarification from the Commission -- specifically, the Commission should clarify that the ESP exemption is not a blanket classification of all traffic to and from an information service provider POP as local for compensation purposes. The Commission should also clarify immediately that IP voice service is an information service and that it is subject to the same intercarrier compensation rules that apply when carriers originate or terminate traffic to or from an ISP POP.

[40] IP voice service is defined by Qwest as voice service initiated in the Internet Protocol over a broadband connection.

III. CONCLUSION

For the reasons stated above, Qwest requests that the Commission take the action described herein.

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CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be 1) filed with the FCC via its Electronic Comment Filing System in CC Docket No. 01-92; 2) served via e-mail on Ms. Victoria Goldberg, Pricing Policy Division, Wireline Competition Bureau at Victoria.Goldberg@fcc.gov; 3) served via e-mail on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bcpiweb.com; and 4) served via First Class United States Mail, postage prepaid, on the parties listed on the attached service list.

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